In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1378

BISHOP PROCESSING CO., A BODY CORPORATE OF THE STATE OF MARYLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 31-38) is not yet reported. The opinion of the district court (Pet. App. A 39-44) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on March 3, 1970. The petition for a writ of certiorari

was filed on March 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly implemented a consent decree by ordering petitioner to cease operations after finding substantial evidence that petitioner was violating the decree by its continuing interstate air pollution.

STATEMENT

The Bishop Processing Company of Bishop, Maryland, has operated a rendering and animal reduction plant in the vicinity of the Maryland-Delaware border since 1955. Starting in 1959, the Maryland and Delaware authorities spent some six years in negotiations with the company, seeking abatement of the nauseating odors emanating from its plant. After these negotiations proved fruitless, the Chairman of the Delaware Air Pollution Authority wrote to the Secretary of Health, Education and Welfare, requesting him to take action as contemplated by the Clean Air Act[1] "to secure the abatement of this air pollution problem."

Pursuant to that request, the Secretary implemented the first of the enforcement provisions of the Clean Air Act by calling a conference of concerned state and municipal agencies, 42 U.S.C. 1857d(d)

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[1] 77 Stat. 392, as amended, 81 Stat. 485, 42 U.S.C. (and Supp. IV) 1857 *et seq.*

(1), held in November 1965.[2] Bishop was notified of the conference's recommendations, which called on Maryland to require Bishop to take remedial action. After much more than the six-month statutory period passed without any action by Bishop on these recommendations, the Secretary called a public hearing, 42 U.S.C. 1857d(f)(1), held on May 17 and 18, 1967, at which Bishop was represented by counsel. The hearing board found that Bishop was causing an interstate pollution problem which could be cured by changes in Bishop's facilities, and recommended that these changes be made. The Secretary forwarded these findings and recommendations to Bishop on May 25, 1967, together with a notice, pursuant to 42 U.S.C. 1857d(f)(3), to "cease and desist from discharging malodorous air pollutants and to abate such pollution" by installing corrective devices not later than December 1, 1967. Bishop failed to take "action reasonably calculated to secure abatement of the pollution" and the Secretary, by letter of January 10, 1968, requested the Attorney General to file suit on behalf of the United States to secure abatement of the pollution. 42 U.S.C. 1857d(g)(1).

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[2] The administrative proceedings are described in greater detail in the opinion of the district court denying Bishop's motion to dismiss the complaint in the present proceeding. *United States* v. *Bishop Processing Co.*, 287 F.Supp. 624, 627-629 (D. Md.). The court had previously dismissed as premature a suit filed by Bishop during the administrative proceedings which raised many of the questions considered on denial of the motion to dismiss. See *Bishop Processing Co.* v. *Gardner*, 275 F.Supp. 780 (D. Md.).

The United States filed suit on March 7, 1968. Bishop moved to dismiss and, despite denial of the motion, n. 2, *supra*, did not then or ever answer the complaint. But after the case was set for pre-trial conference, Howard Polin, the company president, wrote to Bishop's then counsel in this case, requesting counsel to contact government attorneys and specifying the terms of a court order to which the company would consent.[3] Counsel forwarded this letter to government counsel, who responded by incorporating Mr. Polin's terms into a stipulation that a consent decree be entered permanently enjoining and restraining Bishop "from discharging malodorous air pollutants into the State of Delaware" (Pet. App. A 40). The district court was to retain jurisdiction for the purpose of enforcing the decree in the following manner:

(a) Upon the plaintiff's filing of an affidavit with the Court by the Director, Air Pollution Control Division, State of Delaware Water and Air Resources Commission, stating that the defendant is discharging malodorous air pollution reaching the State of Delaware, the Court will forthwith order the defendant to cease all manufacturing and processing operations in defendant's rendering and animal reduction plant located near Bishop, Maryland.

(b) The defendant shall have no recourse or appeal from the determination of the Director, Air Pollution Control Division, State of Dela-

[3] The full text of this letter, dated October 4, 1968, made part of the record in the district court and on appeal, is reproduced as Appendix 1 to this brief.

> ware Water and Air Resources Commission, tendered to the Court in the matter described in subparagraph (a) above.

The executed stipulation was filed and the consent decree entered on November 1, 1968.

Following the express terms of the consent decree, the United States subsequently filed a motion for an order to cease operations, supported by two affidavits affirming Bishop's continued interstate air pollution. At the close of a hearing on this motion on March 4, 1969, the district court decided to reserve ruling until further evidence could be submitted concerning Bishop's violation of the consent decree. On September 12, 1969, the United States filed a second motion, accompanied by a detailed affidavit by a meteorologist and supporting exhibits, showing numerous further incidents of pollution. The United States also filed an affidavit by the Acting Director of the Air Pollution Control Division of the Delaware Water and Air Resources Commission, stating in the terms required in the consent decree that Bishop was continuing to discharge malodorous air pollution reaching the State of Delaware. After a hearing, the district court filed its opinion, finding substantial evidence on which the Acting Director's affidavit could be grounded. On November 10, 1969, the court entered an order, pursuant to the consent decree, that Bishop "cease all manufacturing and processing operations" (Pet. App. A 45). That order, stayed pending final outcome of the controversy, was affirmed by the court of appeals.

ARGUMENT

Consistent with the provision of Rule 52(a), F.R.Civ.P., that "Findings of fact shall not be set aside unless clearly erroneous * * *," the court of appeals held that the district court's finding—that the evidence of continued interstate air pollution was sufficient to support the Acting Director's affidavit—was not clearly erroneous. This holding is entirely in accord with this Court's view that the findings of a trial court in a civil action should not be disturbed where the appellate court is not definitely and firmly convinced, on the entire record, "that a mistake has been committed." *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123; *United States* v. *Gypsum Co.*, 333 U.S. 364, 365. Quite to the contrary, here the court of appeals was convinced that the district court's findings were correct.

Petitioner brushes aside the holding of the court of appeals in asking this Court to consider several questions not properly presented by the facts of this case. Petitioner contends that certain "understandings" existed at the time the consent decree was entered, the application of which would exclude precisely the evidence submitted to the district court showing petitioner's violation of the consent decree by continued interstate air pollution.[4] The court below properly rejected such contention (Pet. App. A, p. 36):

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[4] Attached as Appendix 2 is Judge Thomsen's certification, made part of the record in the district court on appeal, that no such "understandings" were communicated to the court at any time before the consent decree was entered or at the

> Whatever merit this argument might have in other circumstances, it must fail here. The consent decree is plain in its terms. Nowhere and at no time was it intimated that any finding of air pollution was to be based upon unexpressed "understandings" with respect to the investigative procedures. Neither before the entry of the consent decree, nor when the judge held a hearing and announced his interpretation of the decree for the guidance of the parties did Bishop disclose the existence of any "understandings" or reservations on its part.
>
> Bishop had ample opportunity to propose incorporation in the decree of any protection it may have felt necessary, and to object to procedures it deemed contrary to its understanding of the decree's terms. It cannot now ask the court to revise the decree by inserting language or to interpret it to embrace matters which, if present at all, were lurking in the recesses of Bishop's corporate mind.

Petitioner's attack on the sufficiency of the evidence ignores the plain language of the consent decree. The consent decree specifically contemplated the filing by the Acting Director of an affidavit stating that petitioner was continuing to discharge pollutants into the air reaching the State of Delaware. The district court interpreted as the consent decree requiring an evidentiary showing of a continuing pollution problem emanating from the plant. It found that that

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hearing of November 1, 1968, during which the court inquired of the defendant of his understanding of the terms of the consent decree prior to its entry.

showing had been made and that the evidence submitted supported the affidavit. Nothing more was required.[6] Petitioner's third contention (Pet. 2, 28), that "cumulative pressures [on counsel] have contributed to a denial of due process of law," is equally lacking in merit. The record reflects no more "pressure" on petitioner's counsel than on respondent's counsel. Petitioner's dilatory tactics contributed substantially to the long delays encountered in bringing these proceedings under the Clean Air Act to ultimate resolution. It cannot now complain that the courts' waning patience with these delays was unwarranted.

In all events, the district court's implementation of the consent decree is clearly correct and does not present a question requiring this Court's review. The decisions below do not threaten the continued use of consent decrees in judicial proceedings, contrary to petitioner's contention, nor do they conflict with this Court's interpretation of the "clearly erroneous" test of Fed.R.Civ.P. 52(a).

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[6] Petitioner's suggestion, that the failure of the courts below to apply Delaware law threatens the development of the law in this field, is indeed curious. It was the inability of the Delaware authorities to obtain relief under state law that prompted the request for federal proceedings under the Clean Air Act, resulting in this suit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.

ROBERT S. LYNCH,
Attorney.

MAY 1970.

APPENDIX 1

October 4, 1968

W. Edgar Porter, Esquire
132 E. Main Street
Salisbury, Maryland

Dear Mr. Porter:

I have given serious thoughts to the discussion we had yesterday regarding Pre-Trial Order No. 1 written by Mr. Kiechel, and your explanation of its contents to me. I have read and re-read the copy you gave me, and it seems very unfair to us.

You know and probably Mr. Kiechel knows that I would like to settle this matter. However, to be penalized by so doing is hard to swallow.

If I am correct, Mr. Kiechel, is willing to have a conference. You also told me that Mr. Kiechel, by telephone, has said that the government would not consent to anything that was not based upon the recommendations and findings and conclusions that the Board made following its hearing in our case, and which he has spelled out in his suggested Pre-Trial Order No. 1, that the government will insist that the Court find the violations that order states.

There are many things fallacious about the findings and conclusions. You may know or recall that H.E.W. sent advance men into the Delaware area before the hearings were held, to prepare the scene and tingle the atmosphere, to give advise and encouragement to would-be witnesses, eliminate poor ones (from their point of view) and in general to prepare for a successful hearing. A devilish situation was made by encouraging and suggesting exaggerations.

Among others, Mr. William H. Megonegel led the television camera crew, to nationally publicize the hearings, and a Mr. Boercher was special liaison to see that everything was carried out as prearranged. Also, you may recall the report of H.E.W. dealing with findings and conclusions was distributed on the second or third day of the meeting which only shows that this report was gotten up and printed prior to the meeting. The only conclusion I can draw is that the hearing was only "window dressing" and actually served no purpose. On the matter of recommendations the act states "giving due consideration to the practicability of complying with such standards as may be applicable and to the physical and economic feasibility."

Conditions relating to finances and the total lack of labor (in our area) has dictated to us a policy of prudence and conservatism. In light of this we have chosen, more realistically, have been made to choose,—a way in which no malodorous odors would go into Delaware. This has been accomplished by drastically reducing the designated odorous materials that previously were used by us.

However, I confess that I would like to settle this case, so that the time and money could be better used, and allow us to go about our daily business, which is difficult enough to run, and get relief from the worry and uncertainties that this case carries.

I would therefore agree to consent to a Court order forbidding us from causing any malodorous odors in the State of Delaware, and further, to fortify this order by agreeing that the Governor of Delaware or someone he designates be the sole authority under this agreement, with no recourse or appeal by us

from his decision and findings, in the event there is another charge we are violating.

Please submit this proposal to Mr. Kiechel promptly, so that you and he can put it in its proper language. If you and he agree upon a conference, I would want you to represent me therein.

Yours,

BISHOP PROCESSING COMPANY

By: /s/ Howard Polin
HOWARD POLIN, President

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. 19274

[Received Jan. 13, 5:00 p.m. '70,
Clerk, U. S. District Court, District of Maryland.]

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

BISHOP PROCESSING COMPANY, a body corporate of the State of Maryland, DEFENDANT

STATEMENT FOR THE RECORD

Bishop Processing Company has appealed (No. 14,148) from an order entered by this Court on November 10, 1969. In its appellant's brief, the following allegation appears (App. Br., p. 3):

> On November 1, 1968 the complaint was settled by a Consent Decree pursuant to which appellant agreed to close his plant if the Director of the Air Pollution Control Division, State of Delaware Water and Air Resources Commission determined that appellant had committed "malodorous air pollution" in the State of Delaware (43A). *Appellant agreed to the compromise and the risk of closing its plant with the understanding (1) that the Director of the Air Pollution Control Division, State of Delaware Water and Air Resources Commission would follow the procedures and standards required by the Delaware air pollution act Delaware Code Title 7, § 6201 et seq. and the regulations issued by the*

Water and Air Resources Commission; and (2) that the Director would specifically not rely on citizen complainants or representatives of the adversary, the federal government. [Emphasis added.]

The underlined recitation of "understandings" were not communicated to this Court by either defendant or plaintiff at any time before the consent decree was entered or at the hearing of November 1, 1968, during which this Court inquired of the defendant of his understanding of the terms of the consent decree, prior to its entry.

The Clerk is directed to docket this statement as part of the record in this case and forward it to the Clerk of the U. S. Court of Appeals for the Fourth Circuit, for inclusion in the record on appeal, pursuant to Rule 10(e), F.R.App.P.

/s/ Roszel C. Thomsen
ROSZEL C. THOMSEN
Chief Judge,
U. S. District Court

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